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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

CECIL I. HUST,

Petitioner and
Plaintiff-Respondent below

against

MOORE-McCORMACK LINES, INC.,

Respondent and
Defendant-Appellant below

PETITION AND BRIEF *AMICUS CURIAE*

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Respondent and
Defendant-Appellant below

PETITION OF *AMICUS CURIAE*

To—THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The undersigned, as counsel for various complainants, has read the petition of Cecil I. Hust and the brief submitted by his attorneys in support of the writ of certiorari herein, and concurs and endorses the arguments and reasons therein set forth.

Your petitioner, Josephine Fontao, administratrix of the estate of Jose Fontao, deceased, alleges that she is the plaintiff in a cause of action in the United States District Court for the Southern District of New York, Civ. 24-156. That her husband, the chief officer of the S. S.

"Agwiprince", a vessel owned, operated and controlled, according to the answer of the defendant named, "Agwilines", was killed through the negligence of the operators of said vessel on the high seas on the 1st of November, 1942. That since the case was commenced she has been informed that although the defendants admit ownership, operation and control of the vessel, they will contend that her husband was actually employed by the W. S. A. and the United States of America, under a "General Agency Agreement" with the defendant named. She further alleges that while her action at common law was commenced on the 2nd of February, 1944, within two years after the death of her husband, more than two years has elapsed since his death, and had elapsed before she learned, or before her attorney had been informed that such a contention of employment by the W. S. A. could be made, and she believes that the Statute of Limitation might be effective as a defense and prevent her from now filing a libel against the United States.

She alleges that her husband was lost through the negligent navigation of the S. S. "Agwiprince" and by reason of the unseaworthy condition of the said vessel, in that certain heavy deck cargo had become loosened in bad weather, and the fore-peak and after-peak of said vessel had become filled with water in bad weather, so as to cause said vessel to be down by the head, and that her husband was injured so seriously that he died on the said date, while in the performance of his duties, and through the negligent act of the master and officers and navigators of said ship, in that they failed to take proper steps to protect him, while he was exposed to the violence of the seas in making an inspection of the deck cargo on the fore-peak of the vessel as aforesaid.

For these reasons, your petitioner deems it important that the question of her right to pursue her action at

common law be determined by the Supreme Court of the United States at an early date.

Your petitioner Jeannette Bitcon, widow of Roy E. Bitcon, alleges that she was duly appointed administratrix of the estate of her husband at Nassau County, Long Island, N. Y. on July 9th, 1945. That she has filed a libel and complaint against the United States of America, and the Luckenbach Steamship Company for damages sustained through the death of her husband who was employed by the firm of Sullivan Dry Dock and Repair Company at a salary of $4600.00 a year, and who was caused to fall from an inadequate and defective ladder furnished to him by the respondent on the 3rd of May 1945, at the foot of Fifty-second Street, Brooklyn, N. Y.

Your petitioner is informed and believes that the circumstances of the death of her husband involving the determination of certain questions of fact, credibility of witnesses, etc. would be that it would be to her advantage as a litigant to have this cause of action determined by a jury of citizens of the United States. She has, on the advice of her attorney, caused a libel to be filed in the United States District Court, Southern District of New York, and she alleges and believes that she is entitled to a trial by jury since the amount of her claim exceeds Twenty ($20.00) Dollars (being a claim of One hundred thousand ($100,000.00) Dollars), by reason of the Seventh Amendment of the Constitution of the United States, and she is informed and believes that Congress, in passing the Jones Act on June 5th, 1920, gave to seamen and their dependents, the right of an election to enforce whatever rights they might have under the said Act, and to have a jury trial as provided by law, and she is informed and believes that no Act of Congress has been passed since then, which specifically or necessarily abrogated or modified that right.

She therefore petitions this Court to grant the petition of the above named Cecil Hust, for the reason that she is advised and believes that the determination of the rights of said Hust, will be determinative of the question of whether she also is entitled to a remedy at common law.

Your Petitioner, THE FRIENDS OF ANDREW FURUSETH LEGISLATIVE ASSOCIATION, alleges that it is an unincorporated non-profit membership organization, organized and existing for the purpose of aiding and encouraging the principles of Andrew Furuseth, who was a leader of seamen from 1885 to the time of his death in 1938. That, as presumably this Court knows, Mr. Furuseth advocated the passage of the La Follette Seamen's Act of March 4, 1915, which freed seamen from bondage and had as its purpose the improving of the status of mariners as to earnings, living conditions on board ship, and freedom from criminal and inhuman punishment, and from arrest and imprisonment for desertion or breach of contract, and for safety of life at sea.

ANDREW FURUSETH, together with his associates and advisors, framed the La Follette Seamen's Act of 1915, including Section 20, a provision which reads as follows:

> "Sec. 20—That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority."

This Section 20 was found by the Supreme Court of the United States to be not broad enough to cover a case also involving assumption of risk (see *Chelentis* v. *Luckenbach*, 247 U. S. 372, 1919). After the decision of the said Supreme Court in the said *Chelentis* case, Section 33 of the Jones Act of June 5, 1920, was strongly and suc-

cessfully advocated by Mr. Furuseth, and because the right to a jury trial was threatened in another case then pending (*Berg* v. *Philadelphia & Reading*, 274 Fed. 534, C. C. A. 3, 1921), the words:

> "Any seaman at his election may maintain an action for damages at law with the right of trial by jury."

were written into the Statute.

The Jones Act, itself, making the Railway Servants' Act applicable to mariners, and abolishing as it did the defenses of assumption of risk, the fellow-servant rule and contributory negligence as complete defenses, has become known (as it was intended by Mr. Furuseth) to be a safety measure.

Negligence is necessarily a comparative thing, depending upon the knowledge of available safety devices of the employer. It has been considered by Mr. Furuseth and by his associates (for the most part merchant seamen and officers of the United States) who are members of this Association, that the Jones Act is a safety measure which is effective in saving human life, in preventing men from becoming maimed, seriously and permanently injured and killed. That it saves the people of the United States heavy burdens in taxes for the maintenance of dependents, and tends to raise the standard of living of people of these United States.

The determination of damages by juries, Mr. Furuseth firmly believed, has the effect of causing Insurance Companies, their agents and inspectors and particularly the steamship operators, to be much more alert in the maintenance and repair of vessels, in the use of better and more sturdy appliances, and in the use and promulgation of rules and regulations of conduct of the work of a mariner, which is inherently dangerous anyway.

Mr. Futuseth further believed that the Jones Act is desirable from the point of view of public interest, in view of the added protection and inducements it offered to the development of a supply of young and native American seamen, necessary to the maintenance of an American Merchant Marine.

No tacit nullification of the Jones Act should therefore be permitted.

WHEREFORE your petitioner respectfully petitions this Honorable Court that the judgment of the Oregon Supreme Court should be reversed.

SILAS B. AXTELL,
Attorney for Petitioners,
Office and P. O. Address,
15 Moore Street,
New York City.

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

SILAS B. AXTELL, being duly sworn deposes and says that he is the Attorney for the co-petitioners named in the foregoing Petition; that he has read the same, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

SILAS B. AXTELL.

Sworn to before me this
29th day of March, 1946.

CLARENCE E. ALTHOUSE,
Notary Public.
N. Y. Co. Clk's No. 199, Reg. No. 420A7.
Commission Expires March 30, 1947.

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BRIEF OF *AMICUS CURIAE*

Preliminary Statement

Permission to file this brief was granted by Order of this Court, No. 625, on January 28, 1946.

There is an important question of law in the Hust case, which directly effects the rights of complainants in suits which they have pending, and the purposes of Andrew Furuseth in the building up and maintaining of the American Merchant Marine, as perpetuated by the association which bears his name, for all of whom your petitioner is attorney of record, as was made to appear from the foregoing brief statement in the Petition.

Question

The important question in the Hust case which directly effects the rights of your petitioners is the right of a seaman to sue at common law with jury trial, a steamship operator, operating under a General Agency form of contract with the War Shipping Administration, in view of the provision of Public Law 17 of March 24, 1943, 57 Stat. 45; 50 U. S. C. A. § 1291.

POINT I

Public Law 17 not only does not directly modify or amend the provisions of the Jones Act, written specifically for the purpose of granting to seamen the right of election to submit issues of fact to a jury, but shows continuing intent to perpetuate those provisions.

(a) *The Respondent Steamship Company appears to us to claim in substance that Congress by implication withdrew from seamen the right to a common law action of negligence against a steamship operator acting as a General Agent for the War Shipping Administrator by providing that the seamen should be employees of the United States. The implication appears to us to be quite the contrary.*

To assume that Congress would deliberately take from seamen and the common law courts the right of having the damages of seamen fixed by jurors of their fellow citizens, would require strong statutory intent, plain and unmistakable, which is not present in the instance of Public Act 17.

The intent of Public Act 17 would seem to be a reassurance to seamen that their common law remedies, saved to them from the beginning were still preserved to them notwithstanding the state of war and changes in shipping administration.

The Seventh Amendment to the United States Constitution; the saving clause in Section 9 of the First Judiciary Act of 1789, 1 Stat. 76, now Judicial Codes Sections 24 and 256, as these remedies have been reaffirmed, and the rights of seamen under them broadened by Section 20 of the La Follett Seamen's Act of March 4, 1915, as amended by Section 33 of the Jones Act of June 5, 1920, 46 U. S. C. A. § 688.

These common law remedies were in existence before the enactment of the First Judiciary Act, *The Hamilton*, 207 U. S. 398, 404 (1907); *The New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344, 390 (1848), and the Seventh Amendment which was proposed for adoption by Congress at the same time that the First Judiciary Act was passed, would therefore seem to have conferred the right to a jury trial upon these pre-existing remedies.

The *La Follette Act* of 1915 as amended by the *Jones* Act of 1920 by merely abolishing the steamship operator's defences would seem to constitute a recognition that the seamen already had the substantive right to sue at common law for their injuries.

The only limitation of these rights appears in the *Suits in Admiralty Act* of March 9, 1920, 46 U. S. C. A. 742, enacted three months prior to the passage of the *Jones* Act. Section 1 of the *Suits in Admiralty Act*, the only section of that Act containing limiting language, stated that no vessel shall, in view of the provisions made for a libel in personam against the United States be subject to arrest and seizure.

A further transitory limitation by judicial construction was put in effect (after ten years of contrary practice by the Fleet Corporation) under the authority of *Johnson* v. *Fleet Corporation*, 280 U. S. 320 (1930). In this case an intent was imputed to Congress to make the *Suits in Admiralty Act* exclusive of seamen's common law remedies, either in rem or in personam, against the Fleet Corporation and the steamship operator.

Since *Brady* v. *Roosevelt S.S. Co.*, 317 U. S. 575, decided January 8, 1943, however, the seaman's common law remedies in personam against the private steamship operator or General Agent have been restored.

In 1927, an attempt was made to nullify the Jones Act by extending to seamen the coverage of the *Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §§ 901, 905.* The measure was opposed by Andrew Furuseth and an exception was written into the bill (*§ 903*), which again saved the seaman's common law remedies. See *Cong. Record, 69th Cong. 2d. sess., Vol. 68, Pt. 5, page 5908.*

Later, in 1936, 1940 and 1942, Congress in the enactment of provisions relating to war risk insurance legislated upon matters which, as will be explained later, closely touched upon the seaman's common law remedies against the operator, and a saving provision was written into the provisions so enacted which saved "the rights of seamen under any provision of existing law." *46 U. S. C. A. § 1128 f.*

The intent of Congress therefore, from this continuous course of legislation, peacetime and wartime, would seem to be in one direction only and that is, with the single exception of limitation of seizure of certain vessels, to preserve the seaman's common law remedies for his injuries, including the right to a jury trial.

(b) *We submit that Public Law 17 is clear and unambiguous to the effect that there is no Congressional intent to limit seamen's rights in personam against the steamship operator, and to the further effect that seamen were not given the status of employees of the United States. It would seem unnecessary, therefore to go into the contents of Congressional committee reports in order to ascertain the intent of Congress.*

At the start, the Statute, *Section 1291 (a)*, states generally, that officers and members of crews employed not "by" but "through" the War Shipping Administration, shall have *all* the rights under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels.

The Act then makes a single exception as to claims for personal injuries, the exception being, as the Act states, "claims administratively disallowed" and states that these claims shall be enforced under the Suits in Admiralty Act. The term "administratively disallowed" is defined in Section *1291 (a)* as a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration.

Here, it would seem that the seaman's common law remedies for claims for personal injuries, that is, common law remedies for claims other than compensation claims or claims which the seaman should elect first to present to the War Shipping Administrator, were saved.

This is more clearly seen when it is born in mind that at the time Public Act 17 was approved, March 24, 1943, seamen had the right, (1) to a libel in personam under the Suits in Admiralty Act, 46 U. S. C. A. § 742, against the War Shipping Administration and the General Agent, (2) and a right to a common law action of damages with or without a jury trial, in personam, against the General Agent,—*Brady* v. *Roosevelt S.S. Co., supra*, (3) whether in addition there was a right to a common law action against the War Shipping Administration, at least a common law action in personam, in cases where the War Shipping Administration was acting in a commercial capacity, we shall later discuss.

Considered with this background Public Act 17 is clear and unambiguous. It provided for prosecution of the libel in personam and saved the common law remedies of seamen against the General Agent.

There is a further consideration necessary in the proper construction of Public Act 17 in view of the fact that the first sentence of the act makes use of the words "employees of the United States" in the expression "Officers and members of crews (hereinafter referred to as "seamen") employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall" etc. But the context of the entire first section of the Act makes clear that such seamen were not to have the status of employees of the United States.

The Act had a broader scope than the Suits in Admiralty Act. The latter Act provided in Section 2 that "a libel in personam may be brought against the United States or against such corporation, as the case may be, *provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation.*" Public Law 17, on the other hand provides in its first Section with respect to claims under preceding clause (2) for injuries or under preceding clause (3) for wages "shall if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act *notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act.*

Construing these two provisions, Public Act 17 would seem to apply to public vessels as well as private or merchant vessels. If so undoubtedly Public Act 17 included many seamen who as employees on public vessels would normally be considered as employees of the United States, and the expression then is merely a handy description without being definitive.

The actual definitive part of the first section of Section 1291 (a), the heart of Public Act 17, follows immediately after the broad statement that seaman so employed shall have all the rights of seamen on privately owned or operated American vessels. This definition is that such seamen because of the temporary wartime character of their em-

ployment, shall not be considered as officers or employees of the United States for the purposes of (1) United States Employees Compensation Act, (2) Civil Service Retirement Act, (3) war pay and allowance provisions, (4) provisions for retirement of civil Service employees, (5) provisions for Allowance on death of officers and enlisted men in the Navy, (6) provisions for compensation of employees of contractors outside the United States.

In other words, such seamen were not to be employees of the United States in fact even when employed on a public vessel or warship. The provisions merely operated to afford a large class of seamen a libel in personam against the United States which they would ordinarily not have, being employees in the public service and afforded administrative remedies only.

That seamen employed on vessels operated under a general agency agreement and sustaining injuries as the result of negligence in such operation were intended by Congress to be treated as employees of the operators, appears further in respect of the amending provisions as to insurance made in Public Act 17.

The United States did agree directly to insure vessels against war risks and marine and collision liability. *Ex. O. 9054, Sec. 2 (c), 50 U. S. C. A. App. Sec. page 547; 46 U. S. C. A. §§ 1128a, 1128e(f); 50 U. S. C. A. § 1292; and see Article 8 of the General Agency Agreement.*

As to loss or injury arising out of operation, on the contrary, the United States agreed only to reimburse the general agent, and then only to the extent not covered by insurance. *46 U. S. C. A. § 1202; and see Article 7 of the General Agency Agreement.* Congress, it would seem, intended that the operator should itself insure all operation risks.

There is a vast difference in the mere shifting of loss as in the case of re-insurance, and the prevention of loss as in the case of direct insurance. *See Vicarious Liability and Administration of Risk, 38 Yale Law Journal 584, 601.* Congress must have intended that operators should be responsible and suable for operation losses.

It was the prevention of injury that was the motivating force behind the passage of the Jones Act. The Jones Act was not suggested by negligence attorneys who wished to preserve the right of trial by jury for the sake of any fees yielded by such practice. It was the life-work of Andrew Furuseth, a Commissioner appointed by the President of the United States to the London Conference with regard to safety of life at sea. *See Official Record of Hearings before the Senate Committee on Commerce, Relative to the Establishment of an American Merchant Marine, 66th Cong., 2d. sess., pages 1626 and 1712.*

That the Jones Act is a measure for the protection of health and safety of seamen has been recognized by this Court. *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 378 (1932).

(c) ***Should the Court desire to consider the legislative history of the Act, we believe the proceedings of Congress in relation to H. R. 133 which became Public Act 17 show in the final stage a further evidence of the intent to preserve the common law remedies for injuries of seamen.***

Before the House and the Senate reached agreement on H. R. 133, a joint conference of representatives of both Houses was had as a result of which a Conference Report was prepared and submitted and agreed to by both Houses. *Cong. Record, 78th Cong. 1st Sess., pages 1989, 1919.* Along with the Conference Report there was presented and read by the Clerk of the House a Statement in explanation

thereof, appearing on page 1989 of the Record, from which the following first two paragraphs are quoted:

> "The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. 133) to amend and clarify certain provisions of law relating to functions of the War Shipping Administration, and for other purposes, submit the following statement in explanation of the effect of the action agreed upon and recommended in the accompanying conference report as to each of such amendments, namely:
>
> Amendment No. 1: This amendment prescribes limitations on the amounts of attorney's fees in the prosecution and enforcement of claims and suits thereon against the War Shipping Administrator or any of his agents, on account of death, injury, illness, maintenance and cure, loss of effects, detention, or repatriation, wages, allotments, etc., on behalf of seamen (or their dependents) who are employees of the United States through the War Shipping Administration. The House bill contained no similar provision. The Senate recedes."

Here was defeated a limitation of seamen's common law rights which would have made it impossible for a seaman to hire the best legal talent. Furthermore, and more important, the limitation here defeated expressly extended to the action against the General Agent as well as to the War Shipping Administrator.

The defeat of the amendment made clear that seamen were not to be treated as government employees but as "citizens of the United States employed as seamen on privately owned and operated American vessels."

In further confirmation of this view, it may be stated that on the day H. R. 133 was reported for approval of the President, March 17, 1943, the same committee of the House that considered H. R. 133, the Committee on Merchant Marine and Fisheries, announced hearings for March 18, 1943 on H. R. 1361, H. R. 1409, H. R. 1858 which would,

as the announcement stated "have the effect of conferring upon men in the merchant marine the same rights, privileges and benefits accruing to those serving in the armed forces." *Cong. Record, 78th Cong. 1st Sess., page 2182.* These bills do not appear to have been reported out of the Committee.

(d) *The Oregon Court in the reliance placed upon certain language of House Report No. 107 has imputed to Congress an intention concerning the seaman's common law action against the private steamship operator which is not clearly expressed therein and which is contrary to the policy of Public Act 17 as expressly declared in that report.*

It was back of these primary evidences of Congressional intent discussed under previous subheadings that the Oregon Court looked to find the evidences of intent most strongly relied upon, to-wit, the discussion of House Report No. 107 on pages 283-285 of the *Hust* v. *Moore-McCormack* opinion in 158 P. (2d) 275.

In addition to House Report No. 107 (55 pages), we should add, there was a later Senate Report No. 62 (26 pages), both on H. R. 133 of the 78th Congress, besides the Conference Report No. 2572; a pamphlet (unnumbered) entitled "Hearings before the Committee on Merchant Marine and Fisheries * * * September 2, 1942" (34 pages); and two Senate Reports, No. 1655 and No. 1813, all on the predecessor Resolution, H. R. 2474 of the 77th Congress.

In view of the fact, however, that the Oregon Supreme Court had referred to the decision of the New York Supreme Court in the case of *Gay* v. *Pope & Talbot, Inc.*, 47 N. Y. S. (2d) 16, which also considered House Report No. 107 as well as Senate Report No. 1655, and that that was a decision favorable to the petitioners, and that the Oregon Court nevertheless reached a contrary conclusion, we turn

to House Report No. 107 to stress certain features not heretofore noticed.

The passage from House Report No. 107 which the Oregon Court apparently regarded as decisive is that appearing on page 21 of the official report which reads:

> "The various rights and remedies under statute and general maritime law with respect to death, injury, illness, and other casualty to seamen, have been rather fully set forth hereinabove. Under clause 2 of section 1 (a) these substantive rights would be governed by existing law relating to privately employed seamen. The only modification thereof arises from the remedial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act. This procedure is appropriate in view of the fact that the suits will be against the Government of the United States."

The Oregon Court did not quote the succeeding sentence from that report, which reads:

> "In such a suit no provision is made for a jury trial as may otherwise be had in a proceeding such as one under the Jones Act for reasons set forth in the letter of the Attorney General (September 14, 1942)."

The letter of the Attorney General dated September 14, 1942, does not appear in House Report No. 107. Rather it appears in the pamphlet above referred to as entitled "Hearings * * * September 2, 1942", at page 33 thereof. The letter states in part:

> "My Dear Mr. Bland: At the hearing, September 2, 1942, on H. R. 7424 the suggestion was presented on behalf of the National Maritime Union that an action at law with jury trial should be afforded seamen where claims are asserted against the United States on account of death, injuries, illness, loss of effects, detention, or repatriation.
>
> I have no wish to oppose jury trial in these cases if to the Congress the adoption of such a policy seems wise. There are certain considerations which I think

should be taken into account in reaching your conclusion on the issue of policy involved.

(1) There is no doubt that Mr. Standard in his memorandum has made a strong appeal. I dare say that there is no group to whom we as a Nation owe more in these first months of the war, no group that has borne a larger brunt of the actual conflict than our merchant seamen. Certainly the protection afforded them should be greater, not less, than that which they enjoy in times of peace. * * *"

It would seem from this letter that the only question under consideration was as to an action at law with jury trial against the United States. Such action against a private steamship operator seems not to have been in question and that therefore *the statement in House Report 107 may be taken as applying only to the case in which the seaman sued the United States directly.*

In further explanation of the remarks of the Attorney General in this letter it may be pointed out that the Act as first introduced, i. e., H. R. 7424 (See Appendix Section of this brief) and to which the Attorney General was addressing his remarks, contained the clause "any claim referred to in clause (1) hereof shall if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act."

It is significant also to point out in this letter that which seems to be a recognition by the Attorney General of the main purpose of the Act as regards seamen, in the words: "Certainly the protection afforded them should be greater, not less, than that which they enjoy in times of peace."

His views in this regard agree with the statement of policy appearing on page 19 of the official report of House Report No. 107, where it is stated:

"In addition to these peacetime *remedial* provisions, additional benefits for war conditions are now pro-

vided to all seamen whether private or Government employees under the decisions of the Maritime War Emergency Board." (Emphasis supplied.)

On the title page of the official report of House Report No. 107, appears the following legend: "February 8, 1943. —Committed to the Committee of the Whole House on the state of the Union and ordered to be printed." The opinion of the Supreme Court of the United States in the case of *Brady* v. *Roosevelt S.S. Co.*, it is to be remembered, was rendered on January 18, 1943, so that one of the "peacetime remedies" to which House Report No. 107 refers, and to which it was desired to add additional benefits must be taken to be the suit at law with jury trial against the private steamship agent operator.

No intention should be imputed to Congress after such explicit declarations of gratitude and purpose to give benefits to seamen in addition to those enjoyed in peacetime, that Congress intended in actual practice to give seamen less than they had before.

(e) *This brings us to the question as to whether seamen have a common law action in personam with a jury trial against the United States or the Maritime Commission or the War Shipping Administrator in cases in which there could be held to be an acting in a commercial and not governmental capacity, because if there is a grave question on this score, obviously Congress did not by implication confer any immunity upon a private steamship operator as agent. We believe there is such question.*

The question has its roots in the opinion of Chief Justice Marshall in *Bank of United States* v. *Planters Bank*, 9 Wheat. 904, 907 (1824), where the Chief Justice stated:

"It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of

that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted. Thus many States of the Union who have an interest in Banks, are not suable even in their own Courts; yet they never exempt the corporation from being sued. The State of Georgia, by giving to the Bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the Bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act."

This Court has many times since cited this case and approved this view, some of the cases being, to cite only a few: *Hopkins* v. *Clemson College*, 221 U. S. 636, 647 (1910); *The Lake Monroe*, 250 U. S. 246, 256 (1919); *United States* v. *Strang*, 254 U. S. 491 (1921); *Ohio* v. *Helvering*, 292 U. S. 360, 369 (1934); *Federal Housing Adm.* v. *Burr*, 309 U. S. 242 (1939); *Brady* v. *Roosevelt S.S. Co.*, 317 U. S. 575, 580 (1943).

The fact that the War Shipping Administrator or a Commission acts in the commercial capacity rather than a corporation in which the United States owns all or part of the stock is believed unimportant in this connection. The suability of the corporation seems not to be one of the criteria which determines whether a corporation or a commission or administrator shall be used by the Government in a particular case. 10 *Tulane Law Rev.* 79.

This very eventuality, in fact, was foreseen and considered by Justice Holmes in the case of *Sloan Shipyards* v. *Fleet Corporation*, 258 U. S. 549, 566 (1922), where it is

stated:

> "These provisions sufficiently indicate the enormous powers ultimately given to the Fleet Corporation. They have suggested the argument that it was so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system. The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a Constitutional rule of law that exonerates him. *Supposing the powers of the Fleet Corporation to have been given to a single man we doubt if anyone would contend that the Acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court.*" (Emphasis supplied.)

The Fleet Corporation has been dissolved but by the *Merchant Marine Act of 1936* all of its functions, powers and duties were transferred to the United States Maritime Commission. *46 U. S. C. A. §§ 1114 and 1117.*

The question as to whether the government is acting in a commercial or governmental capacity in a particular case, of course, is a matter of considerable difficulty. In *The Lake Monroe, supra*, however, it was held that the carrying of government rationed coal to New England was a commercial venture.

There is then the evidence of Congressional intent as to the question of commercial or governmental character of the business of the merchant marine, whether peacetime or wartime, found in *Section 9* of the *Shipping Board Act of September 7, 1916*, c. 451, 39 Stat. 731, which reads:

> "Every vessel purchased, chartered, or leased from the commission shall, unless authorized by the com-

mission, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

This Section passed prior to the entry of the United States into World War I, still stands unchanged. 46 U. S. C. A. § 808.

That the operation of the American merchant fleet was intended by Congress to be undertaken by private and not governmental interests needs no extended explanation. In the enactment of the Merchant Marine Act of 1920, probably no proposition was more fully discussed and debated in Committee hearings and on the floor of Congress, nor did any measure receive wider public acclaim, even by the Fleet Corporation itself, than that the Government should get out of the business of operating merchant ships. See *Hearings before Senate Committee on Commerce Relative to the Establishment of an American Merchant Marine, supra.*

In view of the foregoing considerations it would seem that there was a good basis for the request of the National Maritime Union that an action at law with a jury trial be afforded seamen against the United States, at least in cases where the United States should be held to be acting in a commercial capacity and through a Commission or Administrator.

The Attorney General in his letter of September 14, 1942, discussed above, concludes that wartime secrecy could be better maintained by a suit in admiralty (see copy of this letter in appendix section of this brief), although as noted above, the Attorney General seems to have been referring only to the action against the United States and not against the operator.

But further than this, as pointed out above under subheading (b), the scope of Public Act 17 being broader than the Suits in Admiralty Act, the conclusion naturally arises that Public Act 17 applied to public vessels or warships. This conclusion adequately explains the attitude of the Navy and the Navy's desire to limit jury trials which the Attorney General's letter of September 14, 1942 discloses.

The jury trial was, of course, a radical departure from the usual procedure against naval vessels. Under the *Public Vessels Act of March 3, 1925*, c. 428, 43 Stat. 112, 46 U. S. C. A. §§ 781-790, a libel in personam was authorized against the United States for damages caused by public vessels, which did not permit seizure of such vessels nor, of course, trials by jury.

Prior to the Navy making known its views, the Attorney General in a letter to the House Committee, dated July 30, 1942 (see copy of this letter in appendix section of this brief), had considered the provisions of H. R. 7424 and stated in conclusion, "I find no objection to the enactment of the bill."

But in any event, there being this grave doubt as to the immunity of the United States or the Maritime Commission or the War Shipping Administrator, there can be little doubt that no immunity for a private steamship operator was intended by Congress.

CONCLUSION

The judgment of the Oregon Supreme Court in the *Hust* case should be reversed.

Respectfully submitted,

SILAS B. AXTELL, Attorney,
15 Moore Street,
Borough of Manhattan,
New York City.

MYRON SCOTT,
of Counsel.

Appendix, p. 1

(Hearings Sept. 2, 1942, title page)

MERCHANT MARINE OMNIBUS BILL

HEARINGS

BEFORE THE

COMMITTEE ON THE MERCHANT MARINE AND FISHERIES HOUSE OF REPRESENTATIVES

SEVENTY-SEVENTH CONGRESS

SECOND SESSION

ON

H. R. 7424

A BILL TO AMEND AND CLARIFY CERTAIN PROVISIONS OF LAW RELATING TO FUNCTIONS OF THE WAR SHIPPING ADMINISTRATION, AND FOR OTHER PURPOSES

SEPTEMBER 2, 1942

Printed for the use of the
Committee on the Merchant Marine and Fisheries

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UNITED STATES
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Appendix, p. 2

(Hearings * * * Sept. 2, 1942, p. 1)

MERCHANT MARINE OMNIBUS BILL

HOUSE OF REPRESENTATIVES,
COMMITTEE ON MERCHANT MARINE AND FISHERIES,
Wednesday, September 2, 1942.

The committee met at 10 a. m., Hon. Schuyler Otis Bland (chairman) presiding.

The CHAIRMAN. The committee will come to order.

We have met this morning for the consideration of H. R. 7424.

All the reports on the bill which have been received up to this time have been printed and are contained in Document No. 113, copies of which are available to those in attendance.

(H. R. 7424 and reports follow:)

[H. R. 7424, 77th Cong., 2d sess.]

A BILL To amend and clarify certain provisions of law relating to functions of the War Shipping Administration, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled That all seamen employed by or on behalf of the United States through the War Shipping Administration, or agents or other persons acting for or on behalf of the War Shipping Administration, shall, with respect to (1) death, injuries, illness, loss of effects, detention, or repatriation, or claims arising therefrom; (2) the Federal social security laws and Federal employment tax laws; and (3) allotments, have all of the rights, benefits, exemptions, privileges, and liabilities of seamen employed on privately owned and operated American vessels. Such seamen shall

not be entitled to any benefits nor be subject to any charges provided for Federal employees under the United States Employees Compensation Act, as amended, or the Civil Service Retirement Act as amended. Any claim referred to in clause (1) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. The War Shipping Administration, with respect to seamen employed by it or on its behalf, is hereby authorized to make payments by way of contributions, and to make deductions from wages of such seamen, as if an employer under the Federal social security laws and Federal employment tax laws. The War Shipping Administration and its agents or persons acting on its behalf or for its account may, for convenience of administration, with the approval of the Administrator, make payments of any taxes, fees, charges, or exactions to the United States or its agencies.

* * * *

Appendix, p. 4

(Hearings Sept. 2, 1942, p. 3)

OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., July 30, 1942.

Hon. SCHUYLER O. BLAND,
Chairman, Committee on the Merchant Marine and Fisheries,
House of Representatives,
Washington, D. C.

MY DEAR MR. CHAIRMAN: This acknowledges your letter of July 24, 1942, requesting my views relative to a bill (H. R. 7424) to amend and clarify certain provisions of law relating to functions of the War Shipping Administration, and for other purposes.

Section 1 of the bill would make applicable to seamen employed by or on behalf of the War Shipping Administration, all the rights, benefits, and immunities that they would have if they were employed on privately owned vessels. It would also expressly provide that such seamen shall not be entitled to any of the benefits or be subject to any of the charges provided for employees of the United States.

Section 2 would amend the law relating to marine insurance in time of war so as to permit the War Shipping Administration to furnish protection to seamen which would include all marine risks which seamen might encounter in wartime; for example, injuries sustained in collisions in convey due to black-out conditions.

Section 3 (a) would authorize the War Shipping Administration, prior to making a definite determination of just compensation, to make a deposit with the Treasurer of the United States on account of such just compensation for foreign merchant vessels which it requisitioned.

Under existing law (act of April 1, 1942, Public Law No. 523, sec. 223) the amount of commissions and expenses which may be allowed by the War Shipping Administration to an insurance carrier for commissions and expenses on reinsurance is restricted to a fixed percentage of the premiums. Section 3 (b) of the bill under consideration would remove this restriction so far as expenses are concerned.

Section 3 (c) of the measure would authorize any department or agency of the United States to procure insurance against marine risks on hulls in which the United States has a legal or equitable interest. Sections 3 (d) and (e) would merely clarify certain ambiguities in existing law relating to the insurance of the interest of a general agent for a vessel and the insurance of certain classes of vessels acquired by the War Shipping Administration.

Section 4 would accord to the United States in respect to all vessels under the control of the War Shipping Administration, the same rights to limit liability and to receive benefits as is accorded to owners of private vessels.

Section 5 would provide that section 1 of the bill shall remain in force until 6 months after the termination of the war or until such earlier date as the Congress by concurrent resolution or the President by proclamation may designate.

I find no objection to the enactment of the bill.

Sincerely yours,

FRANCIS BIDDLE,
Attorney General.

Appendix, p. 6

(Hearings * * * Sept. 2, 1942, p. 33)

OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., September 14, 1942.

Hon. SCHUYLER O. BLAND,
Chairman, Committee on the Merchant Marine and Fisheries,
House of Representatives,
Washington, D. C.

MY DEAR MR. BLAND: At the hearing, September 2, 1942, on H. R. 7424 the suggestion was presented on behalf of the National Maritime Union that an action at law with jury trial should be afforded seamen where claims are asserted against the United States on account of death, injuries, illness, loss of effects, detention, or repatriation.

I have no wish to oppose jury trial in these cases if to the Congress the adoption of such a policy seems wise. There are certain considerations which I think should be taken into account in reaching your conclusion on the issue of policy involved.

(1) There is no doubt that Mr. Standard in his memorandum has made a strong appeal. I dare say that there is no group to whom we as a Nation owe more in these first months of the war, no group that has borne a larger brunt of the actual conflict than our merchant seamen. Certainly the protection afforded them should be greater, not less, than that which they enjoy in times of peace. The attempt has been made to cover war risks by insurance. If it is thought that coverage is not adequate (a matter on which I am not sufficiently informed to express a judgment) one would expect the remedy to be sought at that point. At least it seems to me it should be pointed out that the hope

of large jury verdicts on account of marine risks must of necessity be a haphazard and accidental approach rather than a sure approach to satisfying seamen's rights to security for themselves and their families on account of injuries or death that may result from the risks of war.

(2) It has been found necessary in protecting the security of the Nation to adopt an amendment to admiralty rule 46. It has been found that in the course of admiralty litigation information is made available to the enemy detrimental to the national safety and detrimental to the lives and welfare of seamen. The amendment to admiralty rule 46 contemplates careful surveillance of admiralty litigation and control of the proceedings to prevent leakage of information that might be of value to the enemy and of danger to the United States. The scheme of this protection is that every libel is submitted to me; and my assistants, in collaboration with appropriate officers of the Navy, examine the litigation. If the Navy Department is of the view that information stated in the pleadings or liable to be developed in the course of the trial would be of value to the enemy, admiralty rule 46 authorizes the court to impound the pleadings, to hold the trial in camera and to impound all records in the proceedings. It is possible for this to be effective if the matter is heard by a judge. It is much more difficult for it to be effective if it is tried before a jury, and, of course, the rule will not apply if the action is at law. Obviously in trial of cases on claims asserted by seamen because of death, injury, illness, loss of effects, detention, or repatriation, disclosures regarding formation and operations of convoys, routes, protection for shipping, etc., might well be made in the course of trial.

(3) It is to be noted that claims against the United States under the Tucker Act, under the Suits in Admiralty Act, under the Public Vessels Act, are tried by the judge

alone. Congress has rarely allowed a jury trial in suits against the United States.

(4) It is further to be noted that these cases will have to be tried largely on depositions. Judges are better qualified by experience than juries to appraise the value of evidence presented in the form of depositions.

Sincerely yours,

FRANCIS BIDDLE, *Attorney General.*